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MEMORANDUM

To: Sudbury Zoning Board of Appeals
From: William C. Henchy
RE: Comments by Conservation Commission / Board of Selectmen / Historic District
Commission letter to Mass Historic Commission
Date: April 19, 2016

Introduction

On Behalf of Sudbury Station LLC, I offer this Memorandum in response to the comments to the Zoning Board of Appeals by Charles Russo from the Sudbury Conservation Commission dated March 8, 2016 and the Board of Selectmen dated March 8, 2016.¹ I will also comment briefly on the letter from the Sudbury Historical Commission to the Massachusetts Historic Commission dated March 4, 2016.

Sudbury as a Town has in the past largely opposed c. 40B development². It was, as of the

¹ In the first instance, I note that Mr. Russo is not the Sudbury Conservation Commission. G.L. c. 40B sec. 20 defines local boards that may make recommendations to the Board of Appeals on applications under c. 40B. Mr. Russo is not such a person. Moreover, the Conservation Commission did not ratify his correspondence. He is speaking “on behalf of” the Conservation Commission, but that does not meet the statute’s terms. Mr. Russo’s comments, in our view, have no legal standing, but as we have been requested to respond, we will do so with a full reservation of rights.

The Selectmen’s comments are consistent with concerns the Board has expressed publicly in the past. However, they are largely legally insufficient where, as here, the Town of Sudbury has not met its statutory minimum for affordable housing as of the date of my client’s application for a Comprehensive Permit. See, 760 CMR 56.03(1).

² The Town may point to its “support” of the pending Avalon Bay application for a Comprehensive Permit as evidence to the contrary. That “support” has been described to us as based on a belief that, if the Avalon Bay project is approved, that Sudbury Station can be denied. This belief is mistaken—760 CMR 56.03(1) now plainly establishes that the “safe harbor” requirements must exist as of the date of the application for Comprehensive Permit. Cf. *Taylor v. Housing Appeals Committee*, 451 Mass. 149 (2008), construing earlier regulations setting this date as of the decision by the local Board contained in 760 CMR 31.04(1)(a)(2004 version). My client’s application was filed before the Avalon Bay application, and further, no safe harbor existed on the date the Avalon Bay application was filed as well. Thus, both projects are likely, in the end, to go forward, not one or the other. Further, we note specifically that the

date of my client's application for a Comprehensive Permit, at 5.6% of the housing stock in Sudbury qualified as affordable housing according to the last Subsidized Housing Inventory (See <http://www.mass.gov/hed/docs/dhcd/hd/shi/shiinventory.pdf>).

We are constrained to observe that much of the opposition to the Village at Sudbury Station is exclusionary, prejudiced, and pretextual. The reason for the Town's opposition has regrettably been made plain by the statements of its leaders.

Selectman Leonard Simons stated to me and to Christopher Claussen (the proprietor of Sudbury Station LLC, the developer), following a Conservation Commission hearing on August 24, 2015, that Sudbury Station would "bring riff-raff into the neighborhood".

Following another Conservation Commission hearing on January 25, 2016, Mr. David Hornstein, a leader and Member of the Steering Committee of the "Oppose Sudbury Station" group, stated to Mr. Claussen and I that we should "do it (the project) in your own Town". Sudbury was one of the very few communities in the Commonwealth to vote to repeal G.L. c. 40B in the recent referendum vote. The efforts of the First Parish Church to promote "Black Lives Matter" have resulted in the vandalism of the Church's banner on March 18, 2016. (See <http://fpsudbury.org/black-lives-matter/>). Several supporters of the project were called "white trash" during a meeting of the Sudbury Board of Selectmen on April 5, 2016, while I was addressing the Board.

These statements and conduct suggest a very deep vein of exclusionary bias against economic and cultural diversity in Sudbury that is very much alive and well today. One can only imagine the private discussions that take place which lead elected Selectmen and community leaders to believe that these public statements are acceptable.

Whatever the underlying motive, it is a fact that Sudbury has a rich and demonstrated history of exclusionary practices that have had the effect of keeping affordable housing in Town well below the statutory required 10%. Sudbury is a textbook example of the reasons that the Legislature enacted G.L. c. 40B sec. 20-23, and why the law remains as a bulwark against the very exclusionary practices that have so far kept Sudbury at barely half the affordable units that state law requires.

Moreover, we are happy to take the opportunity presented by the comments of the Board

former Chairman of the Planning Board, one major architect of this "support", was a paid member of the Avalon Bay development team. The Director of Planning and Community Development made a very belated "disclosure" of a family member's professional association with the Senior Vice President of Avalon Bay, who has personally appeared before this Board when Ms. Kablack was present and did not recuse herself. Ms. Kablack's conduct, documented in the public records produced by the Town, has been prejudicial to Sudbury Station LLC. It has been reported in the press that a member of this Board, has stated during a hearing on the Avalon Bay matter that he wishes to "get rid of" the Sudbury Station LLC project. We have catalogued all of these matters, and fully reserve all of our rights with regard to what appear to be serious violations of G.L. c. 268A by several Town officials, and violations of the Town's duty to fairly and impartially consider this application. In the event that litigation ensues in this matter, I reserve all of my client's rights and will utilize the discovery process to fully explore these matters and seek recovery if warranted against any individual involved.

of Selectmen and Mr. Russo to suggest that these comments exemplify, and are in fact, evidence of exclusionary conduct in and of themselves.

The Legal Standard

Case law from the Supreme Judicial Court has described in detail the history, purpose, and operation of the Massachusetts comprehensive permit act, sometimes referred to as the anti-snob zoning act, G.L. c. 40B, §§ 20–23. *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 814, 767 N.E.2d 584 (2002) (Wellesley II). See *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, ante 38, 39–44, 767 N.E.2d 584 (2013).

The Court has repeatedly stated that “we have long recognized that the Legislature's intent in enacting [the act] is ‘to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing’ in the Commonwealth.” *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 28–29, 849 N.E.2d 197 (2006), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 354, 294 N.E.2d 393 (1973).

The act allows a public agency, or a limited dividend or nonprofit organization, that wishes to construct low or moderate income housing “to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit.” *Board of Appeals of Woburn v. Housing Appeals Comm.*, supra at 583, 887 N.E.2d 1051, quoting *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 516, 870 N.E.2d 67 (2007). “The zoning board is then to notify those ‘local boards’ for their ‘recommendations’ on the proposal; the zoning board may ‘request the appearance’ of representatives of those ‘local boards’ at the public hearing as may be ‘necessary or helpful’ to the decision on the proposal; and the zoning board may ‘take into consideration the recommendations of the local boards’ when making its decision.” *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 77, 785 N.E.2d 682 (2003), quoting G.L. c. 40B, § 21. The zoning board has “the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application.” G.L. c. 40B, § 21.

“If the board denies an application for a comprehensive permit, the developer may appeal to HAC.” *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 656, 433 N.E.2d 873 (1982) (Wellesley I), citing G.L. c. 40B, § 22. When the HAC reviews the decision of a local zoning board of appeals to deny a comprehensive permit, “[t]he hearing shall be limited to the issue of whether the decision of the board of appeals was reasonable and consistent with local needs.” G.L. c. 40B, § 23. See 760 Code Mass. Regs. § 56.07(1)(b) (2012) (“In the case of the denial of a Comprehensive Permit, the issue shall be whether the decision of the Board was Consistent with Local Needs”).

Should the board attempt to impose conditions on the project, including any reduction in the number of units, such conditions must (a) be based on design, engineering, or environmental deficiencies that directly result from the impact of the project on the site

and (b) such conditions cannot render the project uneconomic. See 760 CMR 56.05(8)(d). The Board may not impose conditions on the project that are not related to those issues, or which render the project uneconomic. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 762 (2010); *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581 (2008).

“Consistent with local needs” is a term of art under G.L. c. 40B, § 20, defined as follows:

“[R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.”

The statute further provides that such requirements and regulations “shall be consistent with local needs where low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use.” *Id.*

Where, as in the case of Sudbury, none of the grounds that would trigger a conclusive presumption that local rules and regulations are consistent with local needs is present, the regulations and cases provide that there is “a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns.” 760 Code Mass. Regs. § 56.07(3)(a) (2012). See *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340, 868 N.E.2d 83 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, supra at 367, 294 N.E.2d 393 (“municipality's failure to meet its minimum [affordable] housing obligations, as defined in § 20, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal”).

Where a town attempts to rebut this presumption, the board bears “the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.” 760 Code Mass. Regs. § 56.07(2)(b)(2) (2012). See *Board of Appeals of Hanover v. Housing Appeals Comm.*, supra at 367, 294 N.E.2d 393 (“In cases where the locality has not met its minimum housing obligations, the board must rest its decision on whether the required need for low and moderate income housing outweighs the valid planning objections to the details of the proposal such as health, site design, and open spaces”).

These are the legal standards applicable to this proceeding.

Against this background, the applicant responds to the comments by the Board of

Selectmen and by Mr. Russo as follows.

General Observations

Since Sudbury has not met its statutory minima for affordable housing, the comments by the Selectmen and by Mr. Russo represent local concerns, which are presumptively outweighed by the need for affordable housing in Sudbury. In the language of the Court, Sudbury's failure to meet its housing needs, due to its past and present exclusionary practices, provide "compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal". *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340, 868 N.E.2d 83 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, supra at 367, 294 N.E.2d 393.

Therefore, these comments should be presumptively disregarded by the Board as a matter of law, even if they were not inaccurate and in many cases exclusionary and pretextual. In point of fact, however, many of the comments are without merit.

Selectmen's Comments

1. Density / Large Building Massing

The Selectmen state that the net density of the project is 18.59 units per buildable acre, which far exceeds that of any other 40B development in Sudbury, which the Selectmen assert is 6 units / acre "on average".

This assertion is first of all, factually inaccurate. It depends on the Town's assumption that the buildable acreage of the site does not include the over 30 acres set aside as open space within the proposal.³ When the entire site is taken into account, the density per acre is 6.15 per acre. Open areas, according to the engineered plans, constitute 82.6% of the site.

Whether or not the density is comparable to other 40B projects in Sudbury is, however, not relevant under the applicable legal standards. However, it is worth noting that in the Zoning Board of Appeal's "Overview of the Chapter 40B Application, Review, Decision and Appeal Process" dated October 18, 2011 (See https://sudbury.ma.us/boardofappeals/wp-content/uploads/sites/257/2014/08/Chapter40BFundamentalsSudbury10_18_2011.pdf?ve

³ As noted by the Director of Planning and Community Development in her Memorandum of February 17, 2016 (see pg. 4, item 5), the Agricultural Preservation Restriction is not signed by the Commissioner of Agriculture as required by G.L. c. 184 sec. 32, and is not permanent. Thus, aside from wetland areas, all 40 acres are in fact buildable. Under the proposal as submitted, my client proposes to keep Lot C (the APR land) as open space. If we are granted an approval for the project, that is how it will stay, and the applicant will be amenable to discussing Ms. Kablack's recommendation that a permanent restriction be executed. However, the assertion that all 40 acres are not developable is wrong, and the Town knows it to be wrong—otherwise, Ms. Kablack would not be recommending the Board of Appeals consider a permanent restriction on the 30 acres at issue.

[rsion=49147c08d4540dddafcb6579e53c94e](#)), that the Board notes at page 13 that density for low rise townhouses of between 8 and 40 units per acre can be achieved “while maintaining appropriate ratios of dwelling space to parking and open space across a broad range of local development patterns”.

Thus, whether it is 6 units per acre or 18.59 units per acre, the proposed development is well within the norms and density guidelines of similar 40B projects under the Zoning Board of Appeals’ own documents, and in fact perfectly consistent with other 40B projects in Sudbury, to the extent that this consideration is relevant at all.

2. Preservation of the Character of Historic Sudbury

The Selectmen assert in their comments that the property is “adjacent” to the Sudbury Center Historic District and is “surrounded by historic buildings and scenic landscapes”. The Selectmen assert that the “negative impact of inserting rows of large buildings” will “permanently alter the character of the historic Town Center” and that the permitting process must “require steps to limit visibility of the development from the historic Town Center and other views”.

These assertions are inaccurate, legally insufficient in any respect, and represent exactly the sort of discriminatory application of local by-laws and regulations to exclude affordable housing the statute is intended to remedy. The reference to the size of the buildings is a typical exclusionary response to a c. 40B proposal that is well known to the Supreme Judicial Court, which has stated that “we have noted that height limitations have often been used by towns as a pretext to exclude affordable housing” *Zoning Board of Appeals of Sunderland v. Sugarbush Meadow LLC*, 464 Mass. 166, n. 21 (2013); *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 29 (2006); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 349 (1973).

The applicant notes that all proposed buildings are located outside of any historic district. We are not aware of any other instance where a person proposing housing outside of a local historic district, affordable or not, has been required by the Town of Sudbury to “limit the visibility of the development from historic town center and other views”. The reason is obvious—jurisdiction of the Historic District Commission is limited to construction of structures within the Sudbury Center Historic District. My client is entitled to offer proof that local requirements have not been applied equally to subsidized and non-subsidized housing, 760 CMR 56.07(2)(a)(4). This particular request is completely unprecedented and represents a discriminatory and exclusionary practice by the Board of Selectmen of Sudbury, and we hereby make it a matter of record in this case.

Furthermore, Boards of Appeals are limited in conditions that they may attach to a Comprehensive Permit to those conditions that a local Board may otherwise impose. There is no authority under Sudbury’s by-laws to require an applicant who is not constructing a structure within in a Historic District to “limit the visibility of the development from the Historic District”, and we are unaware of any instance where this

has ever been requested in Sudbury, much less required. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 755-756 (2010). There is no authority for this position whatsoever—it is exclusionary, discriminatory, and ultra vires.

Moreover, despite the Selectmen’s claim, the site is not in fact “surrounded by historic buildings and scenic landscapes”. It is in fact surrounded by a discontinued railroad right of way, a cemetery, and several private homes.

The applicant is committed to conforming to G.L. c. 40B sec. 20-23 and 760 CMR 56.00 et seq and is amenable to lawful and appropriate discussions of site design. To that end, my client will be making a detailed presentation on these matters on April 25, 2016, will be submitting additional information to the Zoning Board of Appeals, has suggested a site visit by the Board, and has committed to peer review of its site design and architectural elements. These are appropriate matters for the Board’s inquiry, and we will be responsive to all such inquiries. However, pretextual resort to “visual impacts” are beyond the Board’s authority to consider, do not rise to the level of a lawful local concern pursuant to G.L.c. 40B sec. 20-23, and are both discriminatory and exclusionary.⁴

3. Public Safety

The Board of Selectmen assert that Public safety requires safe access to the development by public safety vehicles in addition to school busses and regular traffic. The Board appears to suggest that my client is somehow responsible for the Town’s decision to site its public safety buildings (Police and Fire) on Hudson Road, despite the Selectmen’s comment that “traffic regularly backs up from the lights at the intersection of Hudson Road and Concord Road far beyond Peakham Road”. Given that this is the existing condition, it seems very unwise that the Town chose to site the Fire and Police Stations on that stretch of road, but that is not my client’s fault or responsibility. Once again, this concern is specious and a pretextual basis by the Selectmen to object to the project.

Sudbury Station LLC has submitted a detailed traffic study by MDM Traffic Consultants, Inc. that has been peer reviewed by the Town’s consultant, Vanasse Associates Inc.

Both the applicant’s traffic consultant and the Town’s peer reviewer have concluded that the proposal meets or exceeds all applicable safety requirements and will not cause level of service degradation within intersections at or near the Town Center.

Mr. Claussen has met with the Fire Chief and Deputy Fire Chief and has incorporated all requests made by them. The buildings will contain elevators at the Fire Department’s request, will be sprinkled, and meet all applicable fire codes. Additional emergency access has been provided at the Fire Department’s request. The Fire Department has been consulted and is satisfied with the application.

The Village at Sudbury Station presents no public safety issue whatsoever that has any

⁴ Notwithstanding the foregoing, attached hereto is a Visual Analysis dated April 19, 2016 from the Cecil Group addressing this concern, which is quite clear and speaks for itself.

basis in any evidence that is admissible before the Board. See 760 CMR 56.07(3)(c).

4. Traffic Flow

The Selectmen assert that the traffic study “does not sufficiently consider the existing traffic flow challenges in Sudbury, including impacts to side streets and alternative routes, traffic back-ups and both work and school commute peak periods and the large number of school busses that must proceed through Town Center”.

This claim is simply wrong, and rather than restate the voluminous traffic analysis and peer review that has been done to date, I incorporate all of those documents by reference herein.

The Selectmen suggest that the project will create a cut-through between Concord Road and Hudson Road that must be studied and addressed. We agree with that concern, and will address it in discussions with the Board of Appeals. Peters Way is not a public way as proposed, and we will work with the Board of Appeals to address any concerns in this regard.

5. Preservation of Historic and Cultural Resources

The Selectmen express that the “historic and cultural sensitivity of the development property raises serious concerns about the destruction of irreplaceable artifacts or resources”.

The public record (see the MassHousing Site Eligibility Determination) already properly labels such concerns as “speculation”. As with the so-called “visual impact” concern, this issue is a pretextual and exclusionary issue not raised in connection with other housing developed in Sudbury. We are unaware of any other project with structures not located within a Historic District where such concerns have been raised in Sudbury. This evidence is relevant to the Town’s exclusionary conduct in this matter. 760 CMR 56.07(2)(a)(4).

In point of fact, the Town itself cleared, and placed roadways in the adjacent cemetery land within the past several years without conducting any of the historic and archaeological investigations the Selectmen suggest that Sudbury Station LLC should perform. It appears that one set of rules exists for the Town, and another for the proposed affordable housing project proposed by my client. The Selectmen have, yet again, introduced into the record themselves evidence of the discriminatory treatment given to affordable housing in Sudbury, which is relevant and admissible in this matter. See 760 CMR 56.07(2)(a)(4).

Notwithstanding all of the foregoing, the Selectmen are also wrong. My client has engaged an archaeologist to review the State Archaeologists’ non-public records at the Massachusetts Historical Commission in order to determine whether or not the Town’s speculation about historic, cultural, or archaeological resources had any basis in fact. The

State Archaeologist has conformed that there are no sites of archaeological, cultural, or historical significance within the project.

Of course, this same information is available to the Town. The fact that it has persisted in making false claims about archaeological and cultural resources on the project site is further evidence of the biased, pretextual, discriminatory, and exclusionary nature of the Town's opposition to this project.

6. Environmental Impacts

The Selectmen state that there are no utilities on site at present and that stormwater and wastewater plans must be carefully assessed to avoid harmful effects for the local wildlife, nearby wetlands, and "other environmental resources".

There are no wetland impacts from the proposed project. All wetland boundaries were delineated and approved by the Sudbury Conservation Commission in an Order of Resource Area Determination issued on August 25, 2015.

There will be no impacts to rare species. A "no take" determination was issued by the Massachusetts Natural Heritage and Endangered Species Program on October 29, 2015. A three season wildlife habitat evaluation was performed by Call of the Wild Environmental Services which has confirmed that the area upon which the project is proposed is of low wildlife habitat value—whereas the portion of the site that is being preserved as open space is of high wildlife habitat value.

The Stormwater and wastewater systems will be designed in accordance with applicable standards and the stormwater plans will be subject to peer review by the Board of Appeals' consultant.

The Selectmen's "concerns" about environmental impacts are not based in fact, and have been carefully addressed by the applicant.

7. Fiscal Impacts

Sudbury Station LLC has completed a fiscal impact study of the impact of the project to the Town of Sudbury.

That study is attached and filed herewith. The result of the approval of this project will be a net increase in revenue to the Town of Sudbury annually of \$289,000. During the construction phase of the development, building department fees are expected to be between \$500,000.00 and \$600,000.00.

Over the next 20 years, the Village at Sudbury Station will bring, in today's dollars, approximately \$6,330,000.00 in net revenue to the Town of Sudbury.

Charles Russo Comments on Conservation Commission Letterhead⁵

Mr. Russo's commentary is laced with factual and legal inaccuracies, and greatly oversteps the proper range of commentary for a Conservation Commission in a G.L. c. 40B application. Where the ZBA acts for other local boards in a Comprehensive Permit Application, the Board's powers are limited to those conditions that the local board could apply to a permit application directly to that Board. See, See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 755-756 (2010). Mr. Russo's commentary goes far afield of this standard, even if it were not rife with errors and misstatements.

1. Wetlands

The applicant specifically disputes that there are wetlands within the project area not delineated by the Conservation Commission's ORAD dated August 25, 2015.

The "two areas of isolated vegetated wetlands located at the intersection of Peter's Way and Concord Road" are nothing of the kind. What Mr. Russo refers to are areas on the applicant's land created by the Town when, without any easement or right, it placed a drainage pipe within the Peter's Way layout. That pipe will be removed by the applicant, and the road layout plans collect all stormwater runoff from that point into the project's stormwater management system.⁶ These two "areas" are not wetlands in any legal or factual sense whatsoever. The area of "probable" isolated land subject to flooding "just east of the Ti-Sales entrance" does not exist, and is not a wetland.

Mr. Russo's comment that the plans or record are "misleading" because they did not label the portion of Mineway Brook that was not specifically found to be intermittent or perennial is in itself misleading. The plans approved by the Conservation Commission in its ORAD dated August 25, 2015 did not show this distinction either; the Commission's written decision, agreed to (and indeed, suggested by the Applicant as Mr. Russo well knows), made this distinction. The plans have since been amended to reflect the

⁵ The minutes of the Conservation Commission dated February 22, 2016 reflect that the Conservation Administrator, Ms. Dineen, suggested that the Commission send comments to the ZBA on this application. The minutes indicate that Ms. Dineen and Mr. Ruso were to work on a revision to the letter sent to the Selectmen on Sudbury station for consideration for their comments to MassHousing." The letter sent by Mr. Russo dated March 8, 2016 was not signed by Ms. Dineen, and has not been adopted or approved by the Conservation Commission to the applicant's knowledge. See G.L. c. 40B sec. 20 which defines "Local Board" and G.L. c. 40B sec. 21 describing the role of a local board in the Comprehensive Permit process. Mr. Russo's letter does not meet any of the statutory requirements, or even the decision of the Conservation Commission to have Ms. Dineen and Mr. Russo prepare comments for the Conservation Commission's consideration. The applicant takes a full reservation of rights from these failures to follow the statute and the guidance of the Conservation Commission by Mr. Russo.

⁶ The applicant specifically reserves all of its rights from this trespass by the Town of Sudbury, including the right to insist that the Town correct its infrastructure to keep its own stormwater and runoff on its own property.

language in the Commission's ORAD decision.⁷ Mr. Russo's comments in this regard appear to be deliberately inaccurate.

2. Open Space and Recreation

Mr. Russo claims that the parcel upon which the project is proposed is on the Town's Open Space and Recreation Plan, and is therefore presumptively needed for open space.

This statement is incorrect in multiple respects. First and foremost, Sudbury does not at present have an Open Space and Recreation Plan. The 2009 plan expired in 2013, but was extended in a letter from the Executive Office of Energy and Environmental Affairs to September 2015. It has not been further extended, and a new updated plan does not yet exist.

Second, the expired Open Space plan in question specifically identified this parcel as presenting "an opportunity for further development (by the Town) of an active / passive recreation complex and expansion of the Town Cemetery". In other words, under the expired open space plan it was acceptable for the Town to develop this property, but, according to Mr. Russo, not this applicant. Even under the expired plan, this parcel was not intended to be preserved as open space. This comment by Mr. Russo is another example of pretextual and exclusionary conduct designed to thwart affordable housing in Sudbury,

Finally, the project, as noted above, does propose to preserve some 30 acres of the project site as open space, assuming that an approval of the project is granted.

3. Endangered Species

Mr. Russo continues to propagate the false claim that there are rare species on the site which preclude development. It is certainly true that a portion (not all) of the area proposed for development falls within a designated priority habitat area under the Regulations promulgated by the Massachusetts Natural Heritage and Endangered Species Program (MNHESP). What is not true is that this designation means that rare species will be impacted by the proposed development.

Under the MNHESP Regulations, before any activity can be undertaken within designated priority habitat, that prior review by NMHESP must be made in order to

⁷ To the extent that it matters, no decision on this issue was made by the Commission on August 25, 2015 by agreement. Nevertheless, the applicant has collected and catalogued the evidence that Mineway Brook is in fact intermittent along its entire length within the applicant's property, and in the event that it becomes necessary, is perfectly prepared to prove that point, and reserves all of its rights in this regard. See 310 CMR 10.58(2)(1)(d).

preclude any “take” of a rare species under the Massachusetts Endangered Species Act. See, G.L. c. 131A and 321 CMR 10.00.

Pursuant to that law, the applicant has submitted to the required review, and received a “no take determination” from MNHESP, as Mr. Russo well knows. This is a certification from NMHESP that there will not be a take of a rare species resulting from the proposed project—and that certification extends to any take that would result from alteration of habitat, as well as any direct impact to any rare species. See 321 CMR 10.02.⁸

There is no credible claim that any rare species, or their habitats, will be impacted from the proposed project.

4. MEPA Jurisdiction

Notwithstanding the claims by Mr. Russo (now echoed by Ms. Kablack), MEPA jurisdiction is not present for this project. MEPA jurisdiction occurs when a project (1) is undertaken by the Commonwealth (2) receives financial assistance from the Commonwealth, or (3) requires a permit and triggers a review threshold contained in 301 CMR 11.03 (“provided that the review thresholds for Land and Areas of Critical Environmental Concern shall be considered to be related to the subject matter of any required Permit”).

This project will not receive financial assistance from the Commonwealth and will not require any permit as that term is defined in the MEPA regulations at 301 CMR 11.02.⁹ No MassDOT curb cut is required for either access road, and therefore the review

⁸ “Take, in reference to animals, means to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat.” (emphasis added).

⁹ 301 CMR 11.02 defines “permit” for MEPA jurisdiction as follows:

Permit.

- (a) Any permit, license, certificate, variance, approval, or other entitlement for use, granted by an Agency for or by reason of a Project.
- (b) Permit shall be considered to include an entitlement for use granted by an Agency in accordance with delegated authority in accordance with Federal environmental statutes or regulations (including certification of compliance with the statutes and regulations).
- (c) Permit shall not be considered to include a general entitlement to a Person to carry on a trade or profession, or to operate mechanical equipment which does not depend upon the location of such trade or operation.
- (d) For purposes of review thresholds, Permit shall not be considered to include:
 - 1. a consent order or agreement to the extent it addresses noncompliance with applicable statutes and regulations and does not allow or approve a New Project or an Expansion of a Project;
 - 2. a general or programmatic permit, license, certificate, variance or approval applying to a category of Projects rather than to each individual Project;
 - 3. a permit, license, certificate, variance or approval by rule or by self-certification of compliance; and
 - 4. a permit, license, certificate, variance, or approval to continue a preexisting lawful use on a Project site, or amendments or extensions thereof.

thresholds for parking, land clearing, and impervious surface do not apply. The wastewater treatment plant will be permitted under the DEP General Programmatic permit established pursuant to 314 CMR 5.03 and 314 CMR 5.13(1), and therefore will not require a permit pursuant to 310 CMR 11.02. See G.L. c. 21 sec. 43.

Mr. Russo and Ms. Kablack are simply wrong that MEPA jurisdiction applies to this project. It requires no permits from the Commonwealth, and therefore MEPA is not involved.

5. Other Matters

Mr. Russo raises a host of other issues in a laundry list of comments, many of which are duplicative of the issues raised above. We will continue to work with the ZBA to resolve and respond to legitimate site design issues that are within the jurisdiction of the Zoning Board of Appeals' powers pursuant to G.L. c. 40B sec. 20-23.

Sudbury Historical Commission letter to Massachusetts Historic Commission

On March 4, 2016, the Sudbury Historical Commission wrote a letter to MHC requesting technical assistance with this project.

The reasons cited for the request are, unfortunately, completely incorrect. The Commission stated that it had “anecdotal information about this property which suggests it may have Native American significance”, and that the project is “at the edge of the Sudbury Center Historic District” and that “to date the developer has not acknowledged the concerns of the Commission”.

These statements are, regrettably, false. Well before the date of the letter, the applicant consulted with the Massachusetts Historic Commission in order to ascertain whether there was any basis in fact to these claims, which MassHousing, in its site eligibility letter, labeled speculative. Public review reveals that there were no listed public sites of archaeological or cultural significance on the project site.

Further, my client has engaged a well known archaeologist to review, with the assistance of the State Archaeologist, the non-public records of the Massachusetts Historic Commission. We can confirm that there are no known sites of archaeological or cultural significance on the site.

Further, we have traced the source of the information provided by the Town Historian that there is a native American burial ground on our site. Dr. Curtis Hoffman, who received them from the Town Historian, has provided us the precise coordinates of this site and they are nowhere near our project location.

The fact is that my clients have been very responsive to the Historic Commission's concerns. However, those concerns, once speculative, are now known to be simply incorrect. We suggest, again, that these matters have been used in an attempt to thwart

this project, and the public records produced in my earlier public records suggest strongly that this effort was spearheaded and driven by the Director of Planning and Development, who appears to have written the Sudbury Historic Commission's letter of March 4, 2016 and whose contact information is contained therein.

CONCLUSION

We recognize that this project, being a Chapter 40B project 250 units in size, and located near to the Town center, is controversial. That is to be expected, particularly in a Town with a strong history of thwarting affordable housing developments much smaller than the present proposal.

My clients expect close review of the plans by the Zoning Board of Appeals and by Town Boards, and to receive rigorous peer review, as provided by law.

We also have the right to expect that the objections to the project, the concerns raised, and that the Board's review, be based on the law provided for in Chapter 40B cases, and that Town Boards refrain from inaccurate statements of fact, speculation, and inflammatory conclusions in their comments. We also have every right to object to prejudicial conduct by Town officials, by improper statements by Selectmen about "riff-raff" being brought into Town by this project, and by opposition from "Oppose Sudbury Station" Steering Committee Members whose stated concern is that the developer "do it in his own Town".

Sudbury Station LLC continues to hope that its proposal will be determined by the evidence produced at the Zoning Board of Appeals, in accordance with the law, and through the good-faith efforts of both ZBA members, the applicant, peer reviewers, and members of the public.

We look forward to continuing discussions with the Board.